April 2003

MJI Publications Updates

Child Protective Proceedings Benchbook

Contempt of Court Benchbook – (Revised Edition)

Criminal Procedure Monograph 1 – Issuance of Complaints & Arrest Warrants (Revised Edition)

Criminal Procedure Monograph 2 – Issuance of Search Warrants (Revised Edition)

Managing a Trial Under The Controlled Substances Act

Sexual Assault Benchbook

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Update: Child Protective Proceedings Benchbook

CHAPTER 11

Evidentiary Issues in Child Protective Proceedings

11.12 Expert Testimony in Protective Proceedings

Insert the following at end of Section 11.12 on page 11-21:

In *People v Bulmer*, ___ Mich App ___, ___ (2003), the Michigan Court of Appeals upheld the trial court's admission of a computer-animated slideshow simulation regarding shaken baby syndrome. The prosecutor called an expert witness, Dr. DeJong, to testify regarding shaken baby syndrome. As an aid to illustrate Dr. DeJong's testimony, the prosecutor showed a computer-animated slideshow simulation of what happens to the brain during a "shaken baby" episode. The Court of Appeals stated:

> "Demonstrative evidence is admissible when it aids the factfinder in reaching a conclusion on a matter that is material to the case. *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998). The demonstrative evidence must be relevant and probative. *Id*. Further, when evidence is offered not to recreate an event, but rather as an aid to illustrate an expert's testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event. *Lopez v Gen'l Motors Corp*, 224 Mich App 618, 628, n 13; 569 NW2d 861 (1997).
>
> "After reviewing the slideshow, we conclude that it simply demonstrated what Dr. DeJong was describing in her testimony. Defendant did not object to Dr. DeJong's testimony that described in detail the shaken baby syndrome. The court also clearly advised the jury that the slideshow was a demonstration and not a reenactment of what happened to the victim. The brief slideshow was relevant and probative in refuting defendant's claim that he only "gently" shook the victim. The slideshow was not a reenactment. It illustrated Dr. DeJong's testimony regarding a material issue relating to the case, i.e., whether defendant gently or severely shook the victim. See *Castillo, supra.* Even if we

concluded that the admission of the slideshow was a close evidentiary question, a decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000)." *Id.* at ___.

April 2003

Update: Contempt of Court Benchbook (Revised Edition)

CHAPTER 1

The Nature of the Contempt Power

1.3 Courts Must Exercise Contempt Power With Restraint

Insert the following language at the end of Section 1.3, on page 2:

In *In re Smothers*, ___ F3d ___ (CA 6, 2003), the United States Court of Appeals indicated that courts should be aware of the options available to them in order to maintain respect and decorum in the court, especially when a criminal contempt order may be too strong of a punishment. In *Smothers*, an attorney appeared late for two consecutive court appearances. The attorney was held in criminal contempt. The United States Court of Appeals provided the following guidance:

> "Logic dictates that courts use a form of progressive discipline in the face of such transgressions. First, a lecture from the court regarding the importance and significance of being on time for scheduled appearances is the mildest penalty. . . . If such a lecture is not successful in correcting the problem initially, as it was not here, a court can involve the offending attorney's office management or partnership. An apology on the record and in front of the jury can also be required.
>
> "Courts also have the option of recommending to the appropriate bar association that the attorney be subject to disciplinary action such as a public reprimand. Such a recommendation would encourage state bar associations to assert their natural role and allow the attorney to be reprimanded by peers without the powerful stigma of an order of criminal contempt.
>
> "With the advent of the internet, a public reprimand directly by the court is also a viable option. . . . Disciplinary postings can be placed on a page associated with the court's website. The appropriate public posting might list the attorney's name, details of the misconduct, and the court's disapproval.

"Finally, the imposition of a fine unaccompanied by a formal sanction could be used. District judges routinely impose monetary penalties for tardiness without resorting to a finding of criminal contempt. The amount of the penalty may be based upon the length of the delay or the cost to the court from such delay. Where a non-criminal monetary penalty is imposed, the district judges may direct the attorney to pay a fine to a charity of the attorney's choice or to the clerk's office to be used for expenses associated with the jury (e.g. coffee, donuts and newspapers), which necessarily increase when proceedings are delayed." *Id.* at ___.

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Update: Criminal Procedure Monograph 1—Issuance of Complaints & Arrest Warrants (Revised Edition)

Part A — Commentary

1.4 Alternatives to a Formal Complaint and Warrant

Add the following language and bulleted list on p 8 following the bulleted list of offenses for which a citation to appear may not be issued under the Michigan Vehicle Code:

> "Under MCL 764.9c(1), a citation to appear may not be used for offenses that authorize imprisonment over 93 days. Thus, under the Code of Criminal Procedure, a citation to appear may not be used for any of the following offenses:
>
> - Leaving the scene of a serious personal injury accident, MCL 257.617(1).
> - Failing to give proper information after an accident resulting in personal injury, MCL 257.617a.
> - Negligent homicide, MCL 750.324.
> - Driving under the influence of an intoxicating liquor or other controlled substance (2nd or subsequent offense), MCL 257.625(1).
> - Driving while impaired (2nd or subsequent offense), MCL 257.625(3).
> - Driving under the influence of an intoxicating liquor or other controlled substance causing the death of another, MCL 257.625(4).
> - Driving under the influence of an intoxicating liquor or other controlled substance causing serious impairment of a bodily function to another, MCL 257.625(5).

- Violating MCL 257.625(1), (3), (4), or (5) while a person under the age of 16 is in the vehicle, MCL 257.625(7).

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Update: Criminal Procedure Monograph 2—Issuance of Search Warrants

Part A — Commentary

2.8 Probable Cause Determination

B. Staleness

Insert the following language at the end of the last full paragraph on p 15:

> See also *United States v Pinson*, ___ F3d ___ (CA 6, 2003) (a three-day delay between the confidential informant's controlled purchase and the issuance and execution of the search warrant deemed not too stale, since it was reasonable to conclude that police would still find narcotics, paraphernalia, or marked money in the residence three days after the drug purchase).

Part A — Commentary

2.12 Executing the Search Warrant

Insert the following language after the block quotation on p 22:

Knock-and-announce rules:

> "1) reduce[] the potential for violence to both the police officers and the occupants of the house into which entry is sought; 2) curb[] the needless destruction of private property; and 3) protect[]the individual's right to privacy in his or her own house." *United States v Pinson*, ___ F3d ___, ___ (CA 6, 2003), citing *United States v Bates*, 84 F3d 790, 794 (CA 6, 1996).

Insert the following language as the last paragraph on p 22:

In *United States v Pinson*, ___ F3d ___ (CA 6, 2003), the Court of Appeals, under the knock-and-announce rule, upheld as reasonable a five- to ten-second delay between the police officers' announcement of their presence and authority and their forcible entry into the residence. In concluding that the period of delay was not violative of the knock-and-announce rule and thus reasonable under the Fourth Amendment, the Court recognized that the touchstone under the Fourth Amendment is not the period of delay, but whether, under the circumstances, the officers' actions were reasonable:

> "The Fourth Amendment questions only whether the officers' overall actions were reasonable, not how much time officers must wait to infer a constructive refusal of admittance. . . . Given the testimony of the officers found credible by the district court, the time of day [3:05 p.m.] when the officers executed the warrant, the commotion on the porch, and the knowledge that the residents would not respond to a knock on the door unless they received a telephone call first, we conclude that the time which elapsed between the announcement and entry was sufficient under the circumstances to satisfy the reasonableness requirement of the Fourth Amendment." [Citations omitted.] *Id*. at ___.

Part A — Commentary

2.3 Description of the Place to be Searched

B. Scope of Premises Search and Seizure

Insert the following language at the end of Section 2.3(B) on p 7:

> A search warrant authorizing a search of the grounds or outbuildings within a residence's curtilage does not violate the Fourth Amendment or Const 1963, art 1, § 11, if the warrant authorized a search of the residence. See *People v McGhee*, ___ Mich App ___ (2003) (upholding searches of detached garage and fenced-in dog run adjacent to the garage, where warrants were not restricted to a search of the residences only, but also included all "spaces" or "storage areas" accessible from the property addresses).

Part A — Commentary

2.8 Probable Cause Determination

A. Probable Cause Defined

Insert the following language at the end of the first full paragraph in Section 2.8(A) on p 14:

> For a "fair probability" determination, see *People v McGhee*, ___ Mich App ___ (2003), where the Court of Appeals upheld as sufficient an affidavit supporting a search warrant for records and proceeds of narcotics trafficking because:
>
> > "the affidavit reflected a prolonged investigation, and it was not apparent whether alternative investigative techniques were available to update the probability that the evidence was presently on the property. . . . Further, in light of (1) the large amounts of money exchanged, (2) the quantities involved, (3) the investigating officer's experience, and (4) the duration of the enterprise and testimony provided to the grand jury that implicated defendant McGhee, there was a fair probability that contraband would be found on the premises." [Citation omitted.] *Id*. at ___.

April 2003

Update: Managing a Trial Under The Controlled Substances Act

CHAPTER 1

Major Features Of The Controlled Substances Act

1.6 Part 72 - Schedules of Controlled Substances

A. Schedule 1

Insert the following language at the end of subsection 1.6(A) on p 8:

> Effective April 1, 2003, 2002 PA 710 amended the Public Health Code, at MCL 333.7212(f), by designating MDMA (or "ecstasy") as a Schedule 1 controlled substance, thus aligning it with Michigan's administrative rule, R 338.3113(j), which designates MDMA as a Schedule 1 drug.

CHAPTER 2

Delivery Offenses Under §§7401 and 7402

2.8 Criminal Penalties for Weight-Based Delivery Offenses Involving Schedule 1 or 2 Narcotics or Cocaine

Replace the existing language in Section 2.8 on pp 52-53, including subsections (A)-(D), with the following language:

Effective March 1, 2003, 2002 PA 665 amended MCL 333.7401(2)(a) by changing the weight categories and corresponding penalties for all delivery offenses involving mixtures containing Schedule 1 or 2 narcotics or cocaine. Also changed under 2002 PA 665 is the consecutive sentencing provision under MCL 333.7401(3), which now makes consecutive sentencing for the commission of another felony discretionary. Finally, 2002 PA 665 added provisions allowing discharge from lifetime probation after an individual has served five or more years of that probationary period.

MCL 333.7401(2)(a), as amended by 2002 PA 665, delineates three new subsections of weight categories and punishment and leaves one subsection (Less Than 50 Grams)* intact, as follows:

*Except that effective March 1, 2003, 2002 PA 665 amended MCL 333.7401(2)(a)(iv) by deleting the mandatory one-year imprisonment requirement for deliveries of less than 50 grams.

A. 1,000 Grams or More

- Imprisonment for life or any terms of years or a maximum fine of $1,000,000.00, or both. MCL 333.7401(2)(a)(i).
- Consecutive sentencing discretionary. MCL 333.7401(3).
- Eligible for probation, suspension of sentence, or parole. MCL 333.7401(3).
- Eligible for sentence reduction by disciplinary credits or other types of sentence credits. MCL 333.7401(3).

B. 450 Grams or More, But Less than 1,000 Grams

- Imprisonment for not more than 30 years or a maximum fine of $500,000.00, or both. MCL 333.7401(2)(a)(ii).
- Consecutive sentencing discretionary. MCL 333.7401(3).
- Eligible for probation, suspension of sentence, or parole. MCL 333.7401(3).

- Eligible for sentence reduction by disciplinary credits or other types of sentence credits. MCL 333.7401(3).

C. 50 Grams or More, But Less than 450 Grams

- Imprisonment for not more than 20 years or a maximum fine of $250,000.00, or both. MCL 333.7401(2)(a)(iii).
- Consecutive sentencing discretionary. MCL 333.7401(3).
- Eligible for probation, suspension of sentence, or parole. MCL 333.7401(3).
- Eligible for sentence reduction by disciplinary credits or other types of sentence credits. MCL 333.7401(3).

D. Less Than 50 Grams

- Imprisonment for not more than 20 years or a maximum fine of $25,000.00, or both. MCL 333.7401(2)(a)(iv).*
- Consecutive sentencing discretionary. MCL 333.7401(3).
- Eligible for probation, suspension of sentence, or parole. MCL 333.7401(3).
- Eligible for sentence reduction by disciplinary credits or other types of sentence credits. MCL 333.7401(3).

*Effective March 1, 2003, 2002 PA 665 amended MCL 333.7401(2)(a)(iv) by deleting the mandatory one-year imprisonment requirement.

CHAPTER 3

Possession Offenses Under §§7403

3.8 Criminal Penalties for Weight-Based Possession Offenses Involving Schedule 1 or 2 Narcotics or Cocaine

Replace the existing language in Section 3.8 on pp 76-78, including subsections (A)-(E), with the following language:

> Effective March 1, 2003, 2002 PA 665 amended MCL 333.7403(2)(a) by changing the weight categories and corresponding penalties for all the possession offenses involving mixtures containing Schedule 1 or 2 narcotics or cocaine. In addition, 2002 PA 665 added provisions allowing discharge from lifetime probation after an individual has served five or more years of that probationary period.
>
> MCL 333.7403(2)(a), as amended by 2002 PA 665, delineates three new subsections of weight categories and punishment but leaves two subsections (25 Grams or More, But Less Than 50 Grams, and Less Than 25 Grams) intact, as follows:

A. 1,000 Grams or More

- Imprisonment for life or any terms of years or a maximum fine of $1,000,000.00, or both. MCL 333.7403(2)(a)(i).

B. 450 Grams or More, But Less than 1,000 Grams

- Imprisonment for not more than 30 years or a maximum fine of $500,000.00, or both. MCL 333.7403(2)(a)(ii).

C. 50 Grams or More, But Less than 450 Grams

- Imprisonment for not more than 20 years or a maximum fine of $250,000.00, or both. MCL 333.7403(2)(a)(iii).

D. 25 Grams or More, But Less Than 50 Grams

- Imprisonment for not more than four years or a maximum fine of $25,000.00, or both. MCL 333.7403(2)(a)(iv).*

E. Less Than 25 Grams

- Imprisonment for not more than four years or a maximum fine of $25,000.00, or both. MCL 333.7403(2)(a)(v). Although this offense authorizes the same penalties as the foregoing offense under MCL 333.7403(2)(a)(iv), this offense is subject to relief under MCL 333.7411 (otherwise known as "7411").

*Effective March 1, 2003, 2002 PA 665 amended MCL 333.7403(2)(a)(iv) by deleting the mandatory one-year imprisonment requirement.

CHAPTER 15

Sentencing

15.2 Sentencing for Major Controlled Substance Offenses

B. Major Controlled Substance Offenses Requiring Minimum Prison Terms that Permit Departure for "Substantial and Compelling Reasons"

Replace the existing language in Section 15.2(B) with the following:

> Effective March 1, 2003, 2002 PA 665 amended MCL 333.7401(2)(a) and MCL 333.7403(2)(a) by changing the weight categories and corresponding penalties for all the delivery and possession offenses involving mixtures containing Schedule 1 or 2 narcotics or cocaine, thus deleting the previously authorized minimum imprisonment terms for certain major controlled substance offenses. In addition, 2002 PA 665 deleted the provisions in MCL 333.7401(4) and MCL 333.7403(3) that allowed a court to depart from a mandatory minimum sentence under the previous versions of MCL 333.7401(2)(a)(ii)–(iv) or MCL 333.7403(2)(a)(ii)–(iv).

C. Major Controlled Substance Offenses that Require Consecutive Sentences

Replace the second bullet in Section 15.2(C) with the following bullet:

- MCL 333.7401(3), as amended by 2002 PA 665, effective March 1, 2003, now makes it discretionary for courts to impose a term of imprisonment for a violation of MCL 333.7401(2)(a) (manufature, delivery, or possession with intent to deliver a Schedule 1 or 2 narcotic drug or cocaine) consecutively with any term of imprisonment imposed for the commission of another felony. In addition, 2002 PA 665 deleted the provision in MCL 333.7401(3) that applied to violations of MCL 333.7403(2)(a)(i)–(iv) (possession of a Schedule 1 or 2 narcotic drug or cocaine). Thus, there is currently no provision in these sections of the Controlled Substances Act that allows for consecutive sentences for possession offenses and another felony.

CHAPTER 15

Sentencing

15.2 Sentencing for Major Controlled Substance Offenses

D. Lifetime Probation Offenses

Insert the following language at the end of Section 15.2(D) on p 324:

Effective March 1, 2003, 2002 PA 665 amended MCL 333.7401 and MCL 333.7403 by deleting lifetime probation as a sentencing option. Additionally, 2002 PA 665 now permits a person who was sentenced to lifetime probation before March 1, 2003, to be discharged after five years. Such a discharge may only occur upon recommendation of the probation officer or upon petition to the court for resentencing. MCL 333.7401(4) and MCL 333.7403(3) now provide:

> "If an individual was sentenced to lifetime probation under subsection (2)(A)(iv) before [March 1, 2003] and the individual has served 5 or more years of that probationary period, the probation officer for that individual may recommend to the court that the court discharge the individual from probation. If an individual's probation officer does not recommend discharge as provided in this subsection, with notice to the prosecutor, the individual may petition the court seeking resentencing under the court rules. The court may discharge an individual from probation as provided in this subsection. An individual may file more than 1 motion seeking resentencing under this subsection."

CHAPTER 15

Sentencing

15.2 Sentencing for Major Controlled Substance Offenses

Insert the following new subsection at the end of Section 15.2 on p 324:

E. Changes to Parole Provisions During the 2002 Legislative Session

Effective March 1, 2003, 2002 PA 670 amended MCL 791.234 by adding subparagraphs (11), (12), and (13), which now provide automatic parole eligibility for persons convicted of specified delivery and possession offenses before the effective date of the amendatory act, i.e., convictions entered before March 1, 2003, for offenses with the former weight classifications, as detailed below.

- **225 grams or more, but less than 650 grams (20-30 years)**

  A person convicted before March 1, 2003, of violating or conspiring to violate MCL 333.7401(2)(a)(ii) (delivery) or MCL 333.7403(2)(a)(ii) (possession) is eligible for parole after serving the ***minimum of each sentence imposed for that violation or 10 years*** of each sentence imposed for that violation, whichever is less. MCL 791.234(11).

- **50 grams or more, but less than 225 grams (10-20 years)**

  A person convicted before March 1, 2003, of violating or conspiring to violate MCL 333.7401(2)(a)(iii) (delivery) or MCL 333.7403(2)(a)(iii) (possession) is eligible for parole after serving the ***minimum of each sentence imposed for that violation or 5 years*** of each sentence imposed for that violation, whichever is less. MCL 791.234(12).

- **Less than 50 grams (1-20 years, consecutive sentencing only)**

  A person convicted before March 1, 2003, of violating or conspiring to violate MCL 333.7401(2)(a)(iv) (delivery) or MCL 333.7403(2)(a)(iv) (possession) and who is sentenced to a term of imprisonment that is consecutive to a term of imprisonment imposed for any other violation of MCL 333.7401(2)(a)(i) to (iv) or MCL 333.7403(2)(a)(i) to (iv) is eligible for parole after serving ***1/2 of the minimum sentence*** imposed for each violation. MCL 791.234(13). However, if the person was on probation or parole at the time of the commission of the offense, he or she is not eligible for early parole from that sentence. *Id*.

Note: 2002 PA 670 did not amend the parole provisions governing the "650 grams or more" weight classification. Parole eligibility for those offenses is governed by MCL 791.234(6).

April 2003

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.2 "Penetration" Offenses

A. Criminal Sexual Conduct – First Degree

1. Statutory Authority

Effective April 1, 2003, 2002 PA 714 amended MCL 750.520b by adding subparagraph (1)(b)(iv) which specifically prohibits a teacher or school administrator at a public or nonpublic school* from engaging in sexual penetration with a person who is at least 13 but less than 16 years old and who is enrolled in that particular school.

*For a definition of a "public" and "nonpublic" school, see the revised school code at MCL 380.5. 2002 PA 714.

Thus, replace the existing statutory block quotation in Section 2.2(A)(1) with the following block quotation (the added statutory language is bolded):

> MCL 750.520b (CSC I—Penetration) provides:
>
> > "(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
> >
> > "(a) That other person is under 13 years of age.
> >
> > "(b) That other person is at least 13 but less than 16 years of age and any of the following:
> >
> > "(*i*) The actor is a member of the same household as the victim.
> >
> > "(*ii*) The actor is related to the victim by blood or affinity to the fourth degree.
> >
> > "(*iii*) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.
> >
> > **"(*iv*) The actor is a teacher, substitute teacher, or administrator of the public or nonpublic school in which that other person is enrolled.**

"(c) Sexual penetration occurs under circumstances involving the commission of any other felony.

"(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

"(*i*) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

"(*ii*) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in subdivision (f)(*i*) to (*v*).

"(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

"(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:

"(*i*) When the actor overcomes the victim through the actual application of physical force or physical violence.

"(*ii*) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

"(*iii*) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, 'to retaliate' includes threats of physical punishment, kidnapping, or extortion.

"(*iv*) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

"(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

"(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

"(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:

"(*i*) The actor is related to the victim by blood or affinity to the fourth degree.

"(*ii*) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

"(2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment in the state prison for life or for any term of years." [Emphasis added.]

CHAPTER 2

The Criminal Sexual Conduct Act

2.2 "Penetration" Offenses

B. Criminal Sexual Conduct – Third Degree

1. Statutory Authority

Effective April 1, 2003, 2002 PA 714 amended MCL 750.520d by adding subparagraph (1)(e) which specifically prohibits a teacher or school administrator at a public or nonpublic school* from engaging in sexual penetration with a person who is at least 16 but less than 18 years old and who is a student at that particular school. New subparagraph (1)(e) specifically exempts emancipated students and those who are lawfully married to the actor at the time of the alleged violation.

*For a definition of a "public" and "nonpublic" school, see the revised school code at MCL 380.5. 2002 PA 714.

Thus, replace the existing statutory block quotation in Section 2.2(B)(1) with the following block quotation (the added statutory language is bolded):

MCL 750.520d (CSC III—Penetration) provides:

> "(1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:
>
> "(a) That other person is at least 13 years of age and under 16 years of age.
>
> "(b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(*i*) to (*v*).
>
> "(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
>
> "(d) That other person is related to the actor by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.
>
> **"(e) That other person is at least 16 years of age but less than 18 years of age and a student at a public or nonpublic school, and the actor is a teacher, substitute teacher, or administrator of that public or nonpublic school. This subdivision does not apply if the other person is emancipated or if both persons are lawfully married to each other at the time of the alleged violation.**

"(2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than 15 years." [Emphasis added.]

CHAPTER 2

The Criminal Sexual Conduct Act

2.3 "Contact" Offenses

A. Criminal Sexual Conduct – Second Degree

1. Statutory Authority

Effective April 1, 2003, 2002 PA 714 amended MCL 750.520c by adding subparagraph (1)(b)(iv) which specifically prohibits a teacher or school administrator at a public or nonpublic school* from engaging in sexual contact with a person who is at least 13 but less than 16 years old and who is enrolled in that particular school.

*For a definition of a "public" and "nonpublic" school, see the revised school code at MCL 380.5. 2002 PA 714.

Thus, replace the existing statutory block quotation in Section 2.3(A)(1) with the following block quotation (the added statutory language is bolded):

> MCL 750.520c (CSC II—Contact) provides:
>
> "(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:
>
> "(a) That other person is under 13 years of age.
>
> "(b) That other person is at least 13 but less than 16 years of age and any of the following:
>
> "(*i*) The actor is a member of the same household as the victim.
>
> "(*ii*) The actor is related by blood or affinity to the fourth degree to the victim.
>
> "(*iii*) The actor is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.
>
> **"(*iv*) The actor is a teacher, substitute teacher, or administrator of the public or nonpublic school in which that other person is enrolled.**
>
> "(c) Sexual contact occurs under circumstances involving the commission of any other felony.
>
> "(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:
>
> "(*i*) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
>
> "(*ii*) The actor uses force or coercion to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in sections 520b(1)(f)(*i*) to (*v*).

"(e) The actor is armed with a weapon, or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.

"(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in section 520b(1)(f)(*i*) to (*v*).

"(g) The actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

"(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:

"(*i*) The actor is related to the victim by blood or affinity to the fourth degree.

"(*ii*) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

"(i) That other person is under the jurisdiction of the department of corrections and the actor is an employee or a contractual employee of, or a volunteer with, the department of corrections who knows that the other person is under the jurisdiction of the department of corrections.

"(j) That other person is under the jurisdiction of the department of corrections and the actor is an employee or a contractual employee of, or a volunteer with, a private vendor that operates a youth correctional facility under section 20g of 1953 PA 232, MCL 791.220g, who knows that the other person is under the jurisdiction of the department of corrections.

"(k) That other person is a prisoner or probationer under the jurisdiction of a county for purposes of imprisonment or a work program or other probationary program and the actor is an employee or a contractual employee of or a volunteer with the county or the department of corrections who knows that the other person is under the county's jurisdiction.

"(*l*) The actor knows or has reason to know that a court has detained the victim in a facility while the victim is awaiting a trial or hearing, or committed the victim to a facility as a result of the victim having been found responsible for committing an act that would be a crime if committed by an adult, and the actor is an employee or contractual employee of, or a volunteer with, the facility in which the victim is detained or to which the victim was committed.

"(2) Criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 15 years." [Emphasis added.]

CHAPTER 2

The Criminal Sexual Conduct Act

2.3 "Contact" Offenses

B. Criminal Sexual Conduct – Fourth Degree

1. Statutory Authority

Effective April 1, 2003, 2002 PA 714 amended MCL 750.520e by adding subparagraph (1)(f) which specifically prohibits a teacher or school administrator at a public or nonpublic school* from engaging in sexual contact with a person who is at least 16 but less than 18 years old and who is a student at that particular school. New subparagraph (1)(f) specifically exempts emancipated students and those who are lawfully married to the actor at the time of the alleged violation.

*For a definition of a "public" and "nonpublic" school, see the revised school code at MCL 380.5. 2002 PA 714.

Thus, replace the existing statutory block quotation in Section 2.3(B)(1) with the following block quotation (the added statutory language is bolded):

MCL 750.520e (CSC IV—Contact) provides:

> "(1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:
>
> "(a) That other person is at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person.
>
> "(b) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances:
>
> "(*i*) When the actor overcomes the victim through the actual application of physical force or physical violence.
>
> "(*ii*) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute that threat.
>
> "(*iii*) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute that threat. As used in this subparagraph, 'to retaliate' includes threats of physical punishment, kidnapping, or extortion.
>
> "(*iv*) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.
>
> "(*v*) When the actor achieves the sexual contact through concealment or by the element of surprise.

"(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

"(d) That other person is related to the actor by blood or affinity to the third degree and the sexual contact occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.

"(e) The actor is a mental health professional and the sexual contact occurs during or within 2 years after the period in which the victim is his or her client or patient and not his or her spouse. The consent of the victim is not a defense to a prosecution under this subdivision. A prosecution under this subsection shall not be used as evidence that the victim is mentally incompetent.

"(f) That other person is at least 16 years of age but less than 18 years of age and a student at a public or nonpublic school, and the actor is a teacher, substitute teacher, or administrator of that public or nonpublic school. This subdivision does not apply if the other person is emancipated or if both persons are lawfully married to each other at the time of the alleged violation.

"(2) Criminal sexual conduct in the fourth degree is a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $500.00, or both." [Emphasis added.]

CHAPTER 2

The Criminal Sexual Conduct Act

2.5 Terms Used in the CSC Act

Effective April 1, 2003, 2002 PA 714 amended the CSC Act by adding provisions specifically prohibiting a teacher or school administrator at a public or nonpublic school from engaging in sexual penetration or sexual contact with a student enrolled at that particular school.

Thus, insert the new subsection 2.5(R) "Nonpublic school" on p 87 and new subsection 2.5(U) "Public school" on p 100, and redesignate the remaining subsections in Section 2.5 accordingly:

R. "Nonpublic School"

Effective April 1, 2003, 2002 PA 714 amended the CSC I and CSC II statutes to criminalize the sexual penetration or sexual touching of a person at least 13 but less than 16 years of age in the following circumstances:

- When the perpetrator is a teacher, substitute teacher, or administrator at a public or nonpublic school in which that other person is enrolled. MCL 750.520b(1)(b)(iv) (CSC I) and MCL 750.520c(1)(b)(iv) (CSC II).

Effective April 1, 2003, 2002 PA 714 amended the CSC III and CSC IV statutes to criminalize the sexual penetration or sexual touching of a person at least 16 but less than 18 years of age in the following circumstances:

- When the perpetrator is a teacher, substitute teacher, or administrator at a public or nonpublic school in which that other person is a student. MCL 750.520d(1)(e) (CSC III) and MCL 750.520e(1)(f) (CSC IV).

> **Note:** 2002 PA 714 specifically exempts, under both CSC III and CSC IV, victims who are emancipated students or students who are lawfully married to the actor at the time of the alleged violation. MCL 750.520d(1)(e) (CSC III) and MCL 750.520e(1)(f) (CSC IV).

MCL 750.520a(j), by reference, defines "nonpublic school" as "a private, denominational, or parochial school." MCL 380.5(3). For a definition of "public school," see Section 2.5(U), below.

U. "Public School"

Effective April 1, 2003, 2002 PA 714 amended the CSC I and CSC II statutes to criminalize the sexual penetration or sexual touching of a person at least 13 but less than 16 years of age in the following circumstances:

- When the perpetrator is a teacher, substitute teacher, or administrator at a public or nonpublic school in which that other person is enrolled. MCL 750.520b(1)(b)(iv) (CSC I) and MCL 750.520c(1)(b)(iv) (CSC II).

Effective April 1, 2003, 2002 PA 714 amended the CSC III and CSC IV statutes to criminalize the sexual penetration or sexual touching of a person at least 16 but less than 18 years of age in the following circumstances:

- When the perpetrator is a teacher, substitute teacher, or administrator at a public or nonpublic school in which that other person is a student. MCL 750.520d(1)(e) (CSC III) and MCL 750.520e(1)(f) (CSC IV).

> **Note:** 2002 PA 714 specifically exempts, under both CSC III and CSC IV, victims who are emancipated students or students who are lawfully married to the actor at the time of the alleged violation. MCL 750.520d(1)(e) (CSC III) and MCL 750.520e(1)(f) (CSC IV).

MCL 750.520a(m), by reference, defines "public school" as "a public elementary or secondary educational entity or agency that is established under this act, has as its primary mission the teaching and learning of academic and vocational-technical skills and knowledge, and is operated by a school district, local act school district, special act school district, intermediate school district, public school academy corporation, strict discipline academy corporation, or by the department or state board. Public school also includes a laboratory school or other elementary or secondary school that is controlled and operated by a state public university described in section 4, 5, or 6 of article VIII of the state constitution of 1963." MCL 380.5(5).

For a definition of "nonpublic school," see Section 2.5(R), above.

CHAPTER 11

Sex Offender Identification and Profiling Systems

11.2 Sex Offenders Registration Act

L. Pertinent Case Law Challenging Registration Act

1. Retroactive Application

Add the following language at the end of Section 11.2(L)(1) on p 528:

> In a case of first impression, the United States Supreme Court has held that the registration and notification requirements in a state's "Megan's Law" do not constitute punishment and thus may be applied retroactively under the *Ex Post Facto Clause*.
>
> In *Smith v Doe*, ___ US ___ (2003), two convicted sex offenders brought suit seeking to declare Alaska's Sex Offender Registration Act void under the *Ex Post Facto Clause*. The respondent sex offenders, whose convictions were entered before the passage of the Act, claimed that the Act's registration and notification requirements, which applied to them under the terms of the Act, constituted retroactive punishment in violation of the *Ex Post Facto Clause*. In reversing the Court of Appeals, the Supreme Court found that the Act is nonpunitive, thus making retroactive application permissible and not violative of the *Ex Post Facto Clause*. In coming to this conclusion, the Supreme Court found that the intent of the Alaska Legislature in promulgating the Act "was to create a civil, nonpunitive regime," whose primary purpose was to "protect[] the public from sex offenders." *Id*. at ___, ___.
>
> In addition to finding that the Alaskan Legislature's intent in promulgating the Act was nonpunitive, the Court also found that the purpose and effect of the Act's statutory scheme is not so punitive as to negate the state's intention to deem it civil. In so holding, the Court determined that the Act (1) has not been regarded in history and tradition as punishment; (2) does not impose an affirmative disability or restraint; (3) does not promote the traditional aims of punishment; (4) has a rational connection to a nonpunitive purpose; and (5) is not excessive with respect to that purpose.

CHAPTER 11

Sex Offender Identification and Profiling Systems

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4. Double Jeopardy, Equal Protection, and Due Process Under U.S. Constitution

Replace the Note on p 530 with the following language:

> The United States Supreme Court has held that due process does not require a state to provide a hearing to determine "current dangerousness" before it publicly discloses a convicted sex offender's name, address, photograph, and description on its sex offender registry.
>
> In *Connecticut Department of Public Safety v Doe*, ___ US ___ (2003), the respondent, a convicted sex offender, brought suit against the Connecticut Department of Public Safety on behalf of himself and other sex offender registrants, claiming that the public disclosure of names, addresses, photographs, and descriptions on Connecticut's sex offender registry violates procedural due process under the Fourteenth Amendment. Respondent specifically argued that he and the other registrants were deprived of a liberty interest—reputation combined with status alteration under state law—without first being afforded a predeprivation hearing to determine "current dangerousness." In reversing the judgments of the Court of Appeals and district court, which held that due process requires such a hearing, the Supreme Court began its analysis by first noting that under *Paul v Davis*, 424 US 693 (1976), "mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest." *Connecticut Department of Public Safety v Doe, supra at* ___. But the Court found it unneccessary to even address this specific question, because "due process does not entitle [respondent] to a hearing to establish a fact that is not material under the Connecticut statute." *Id*. at ___. The Supreme Court stated that the fact at issue here, i.e., "current dangerousness," is of no consequence under Connecticut's sex offender registry because Connecticut requires registration "solely by virtue of [the individual's] conviction record and state law." Moreover, the Connecticut registry even provides a disclaimer on its website that a registrant's alleged nondangerousness does not matter. Thus, the Supreme Court concluded as follows:

> "In short, even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of *all* sex offenders—currently dangerous or not—must be publicly disclosed. Unless respondent can show that that *substantive* rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise. . . .
>
> "Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme. Respondent cannot make that showing here." [Emphases in original.] *Id*. at ___.

The Supreme Court decided this case only on procedural, not substantive, due process grounds, stating that "[because] respondent "expressly disavow[ed] any reliance on the substantive component of the Fourteenth Amendment's protections, . . . we express no opinion on whether Connecticut's Megan's Law violates substantive due process. *Id*. at ___.